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Via Facsimile and Electronic Mail

Thursday, March 16, 2006

Mr. Dexter Thomas
United States Department of Agriculture
AMS, F&V, PACA Branch
1400 Independence Ave. S.W., Room 2095-S
Washington, D.C. 20250-0242

Re: USDA Proposed Rule Making on Electronic Data Interchange, AMS No. 294-05

Dear Mr. Thomas:

I am submitting comments to the Federal Register published on January 30, 2006, regarding proposed rule-making on electronic data interchange ("EDI"). I make these comments based upon my personal knowledge as a fourth generation produce person, former produce company executive and my 17 years' experience as an attorney representing produce companies. My firm represents producers and distributors of produce in matters arising under the Perishable Agricultural Commodities Act ("PACA"). In the past 17 years, we have represented more than 2,300 produce companies in 881 PACA trust enforcement lawsuits resulting in a total recovery of more than \$75,000,000.00. Our clients range from small family farms to large multi-national corporations, many of which have instituted EDI and other electronic invoicing and billing procedures with their customers.

Many of my firm's clients have indicated that EDI is used by large retail grocery customers. The retail grocery business has experienced significant consolidation in recent years. The available outlets for my clients' produce have been shrinking, resulting in a significant disparity in bargaining power between the produce suppliers and the large chain stores. As a result of these changes in the marketplace, new challenges have arisen regarding preservation of PACA trust rights through invoicing using EDI.

Based upon the current status of the PACA regulations, these suppliers can preserve their PACA trust rights by including the statutory PACA trust language on their electronic invoices. However, in reality, this has proven problematic for the following reasons:

- Some purchasers are not allowing a field for the statutory PACA trust language in their EDI format.

- Most purchasers have hired third party vendors to facilitate their EDI transmissions. Thus, the EDI transmission is not flowing directly from the supplier to the purchaser. The purchasers could potentially argue that the supplier did not preserve its PACA trust rights because the statutory PACA trust language was not sent directly to it.
- Some purchasers or their EDI vendors are stripping out the statutory PACA trust language from the EDI transmission. The suppliers send the data to the third party EDI provider, who then forwards the data to the purchaser. The purchasers could potentially argue that the supplier did not preserve its PACA trust rights because the purchaser did not actually receive the statutory PACA trust language.
- A few purchasers are not allowing the suppliers to send any paper documentation related to these sales, and are going so far as to fine the suppliers if paper documents are sent, thus preventing the suppliers from preserving PACA trust rights through paper documentation.

Any regulations promulgated by the United States Department of Agriculture must rectify these four marketplace problems. For these reasons, I would suggest that 7 C.F.R. §46.46(f)(3) be amended to read as follows:

Licensees may choose an alternative method of preserving trust benefits from the requirements described in paragraphs (f)(1) and (2) of this section. Licensees may use their invoices or other billing statements, whether in paper or electronic form, to preserve trust benefits. If a debtor accepts invoices or other billing statements in an electronic form, it must allow for the following statement to be included in its electronic invoicing or other billing statement forms. If the invoice or other billing statement is sent electronically, the seller has met its requirement of giving the debtor written notice of intent to preserve the benefits of the trust if the transmission includes the following statement, irrespective of whether or not the buyer downloads, receives or accepts the statement. If the debtor designates a third party vendor to facilitate its electronic data transactions, the seller will be deemed to have sent the electronic data transmission to the debtor if sent to the designated third party vendor. The supplier will have met the its requirement of giving the debtor written notice of intent to preserve the benefits of the trust by electronic means if it can verify that the electronic data invoice or billing statement was sent to the debtor, or its assigned electronic vendor, containing the following statement. The alternative method requires that the licensee's invoice or other billing statement, whether in paper or electronic form, given to the debtor, contain:

- (i) The statement: “The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by Section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities, until full payment is received.”; and
- (ii) The terms of payment if they differ from prompt payment set out in section 46.2 (z) and (aa) of this part, and the parties have expressly agreed to such terms in writing before the affected transactions occur.

In addition, I would suggest that a new paragraph be added to 7 C.F.R. §46.46 as follows:

Commission merchants, dealers and brokers who purchase perishable agricultural commodities are required to allow their suppliers to preserve their rights, whether in paper or electronic form, as a trust beneficiary as set forth in §46.46 (d) and (f) of this section. Any act or omission which is inconsistent with this responsibility is unlawful and in violation of section 2 of the Act, (7 U.S.C. § 499b).

On behalf of my firm and its clients, I encourage the adoption of the above or equivalent changes to the PACA regulations to alleviate the concerns of produce suppliers when preserving their PACA trust rights when transmitting invoices by EDI.

Please contact me if you have any questions.

Sincerely,

Lawrence H. Meuers

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